IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 97.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,
against
WILLIAM J. WEAVER AND AL., CONSTITUTING THE BOARD OF ASSESSORS OF THE CITY OF ALBANY.

No. 1047.

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,
against
WILLIAM J. WEAVER AND AL.

BRIEF OF PLAINTIFF IN ERROR.

MATTHEW HALE, *Attorney for Plaintiff in error.*
GEO. F. EDMUNDS, *of Counsel.*

ALBANY:
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In error to the Court of Appeals of the State of New York.

The above cases, involving the same general question, are, by leave of the court, to be heard together, under Rule 26, subdivision 6.

STATEMENT AS TO No. 97.

The first case, No. 97, arose upon an application to the Supreme Court of the State of New York for a peremptory mandamus to compel the defendants, as assessors, to reduce the assessment of the relator, for personal property, to the sum of one dollar.

The facts in this case were agreed upon and submitted to the court, under the practice of the State of New York. (See Record, pages 3 to 5.)

The relator, on the 1st day of September, 1875, was a citizen of the State of New York, a resident of the Fourteenth ward of the city of Albany, and the owner of 425 shares of the capital stock of the National Albany Exchange Bank, an association duly organized under the act of Congress commonly known as the National Banking Law, approved June 3d, 1864. Most of its property consisted of bonds of the United States, deposited, pursuant to law, with the Treasurer of the United States. It was located in the Sixth ward of the city of Albany. The defendants were assessors of said city and assessed the relator, in the assessment of taxes in the Sixth ward of the city of Albany for the year 1875, upon his shares of stock in said banking association, in the sum of $38,250. Before the defendants had completed their assessment, the relator appeared before them and made an affidavit, of which a copy is found on page 4 of the Record, that the value of his personal estate, including his bank stock, after deducting his just debts and property invested in stocks of corporations or associations liable to be taxed therefor, and his investments in obligations of the United States, did not exceed the sum of one dollar. He accompanied this affidavit by a demand in writing, also found on page 4, that the defendants should reduce his assessment, for the year, to the sum of one dollar. The defendants refused to comply with this demand. It was admitted that, in fact, the value of the relator's personal estate, including bank

stock, on the 1st day of September, 1875, and on the day of said demand and refusal, after deducting his just debts and his property invested in stocks of corporations or associations liable to be taxed therefor, and his investments in the obligations of the United States, did not exceed the sum of one dollar. It was also admitted that in all cases of individual citizens of the State of New York, owners of money capital other than bank stock, the defendants, as such assessors, in making their assessments for the year 1875, upon affidavits similar to that made by the relator in this case, valued the personal estate of such individual citizen, including moneyed capital, other than bank stock, at the sum specified in such affidavit and no more. (Page 5.)

The assessment roll of the Sixth ward, at the time of the submission to the Supreme Court of the State of New York, was in the hands of the defendants and under their control. (Same page.) The acts of the defendants, as assessors, were under the law of the State of New York, specially applicable to the city of Albany, known as chapter 86 of the year 1850. This act and all other laws of the State, by their terms specially applicable to the city of Albany, were, by agreement of the parties, made part of the case, and may be referred to on any argument thereof. (Pages 4 and 5.)

Among the provisions of chapter 86 of the Laws of 1850, is the following: "If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of the personal estate owned by him after deducting his just debts and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum to be specified in the affidavit, it shall be the duty of the board of assessors to value such personal estate at the sum specified in such affidavit and no more." (N. Y. Session Laws of 1850, page 129, § 9.) They also proceeded in assessing the bank stock of the relator under chapter 761 of the Laws of New York for the year 1866, of which a copy (omitting the sections not applicable) is hereto annexed, marked A.

Three questions were submitted to the Supreme Court of the State of New York upon these facts:

First. Was it the duty of the defendants, as such assessors, to have complied with the demand made by the relator and have reduced his assessment to the sum of one dollar?

Second. Were the defendants, as such assessors, justified in refusing to reduce the relator's assessment, under the law of the State of New York, above referred to? (Chapter 761 of 1866.)

Third. If, by said last-named law, the defendants, as such assessors, were prohibited from making said deduction, was the said State law in violation of the laws of the United States relating to the assessment of taxes, by State authority, upon shares of national banks and especially in violation of the restrictions upon such taxation imposed by section 5219 of the Revised Statutes of the United States, and, therefore, to that extent unconstitutional and void? (Page 5.)

The New York Supreme Court answered the first and third of the above questions in the negative and the second in the affirmative, and gave judgment for the defendants against the relator. (Page 6.) This judgment was affirmed by the Court of Appeals upon the authority of a former decision of that court in the case of the People v. Dolan and others (reported in 36 N. Y., 59).

ASSIGNMENT OF ERRORS IN No. 97.

1. The court below erred in deciding that it was not the duty of the defendants to comply with the demand made by the relator, and reduce his assessments for personal property and for his stock in the National Banking Association, mentioned in the record, to the sum of one dollar, as required by the relator, and in answering the first submitted to said court in the negative.

2. The court below erred in deciding that the law of the State of New York, chapter 761 of the Laws of 1866 (above quoted), was not in violation of the restrictions imposed by section 3219 of the Revised Statutes of the United States,

relating to the assessment of taxes by State authority upon shares of banking associations organized under the laws of the United States, and in deciding the third question to it submitted in the negative.

STATEMENT AS TO No. 1047.

In the second of the above cases an action was brought against the same defendants by the plaintiff, to recover the sum of $13,039.14 and interest, the amount of taxes alleged to have been illegally collected of the plaintiff, and of his assignors, by reason of an unlawful assessment made by the defendants upon his and their shares of stock in a national bank, in the year 1874; the plaintiff alleging that the defendants acted without jurisdiction and in violation of the laws of the United States, and without lawful authority in making such assessment. (See Complaint, pages 2–10 of the record.)

The answer of defendants denied their liability and alleged that their acts in the premises were judicial, were done and performed in good faith. (Pages 11 to 14.) The case was referred to a referee, who found the facts of the case substantially as claimed by the plaintiff. His report may be found at pages 14–20 of the printed record.

These facts, so found, so far as they are material to this case, are as follows:

The plaintiff and his assignors were assessed by the defendants upon their bank shares, in the Sixth ward of the city of Albany, at their par value, $100 a share, less a deduction of ten per cent for the assessed value of the real estate owned by the bank. (See finding 3, p. 15.) The defendants made no inquiry as to the actual value of the shares. They assessed all the shareholders for their shares in the Sixth ward (where the bank was located), without reference to their actual residence. (Finding 8, p. 16.) In consequence of this assessment the marshal of the city, under warrant of the board of supervisors, levied on and seized bank bills belonging to the plaintiff amounting to $1,908.42,

and bank bills belonging to his assignors amounting to $11,130.72, without the consent and against the protest of the plaintiff and his assignors. (Findings 4 and 5, pp. 15, 16.)

The defendants in 1874 assessed the holders of all the shares of banks in the city in the same way, *i. e.*, at their par value, less a deduction for real estate, and did not inquire or endeavor to ascertain the actual or market value of the shares. (Finding 9, p. 16.)

Among the banks in the Sixth ward was a State bank (the Mechanics and Farmers'), the shareholders of which were mostly residents of the State of New York. The par value of its shares was $100 each. These shares were assessed at their par value, less the assessed value of its real estate. (Finding 10, p. 16.) After this deduction the assessed value of each share of the Mechanics and Farmers' Bank was eighty dollars (finding 12, p. 17); that of the National Exchange Bank ninety dollars. (Finding 8, p. 16.)

The surplus of the Mechanics and Farmers' Bank was $710,000 (finding 10); that of the National Exchange Bank $156,275. (Finding 1, p. 15.)

The market value of each share of the Mechanics and Farmers' Bank was about $300 (finding 10); that of each share of the National Exchange Bank about $130. (Finding 1.) Each share of the Mechanics and Farmers' Bank was of more than double the value of each share of the National Exchange Bank. (Finding 12, p. 17.)

It follows, therefore, and was found as a fact by the referee, that the shares of the plaintiff and his assignors in the National Exchange Bank were assessed at a higher rate, in proportion to their actual value, inclusive of surplus, than the shares of the Mechanics and Farmers' Bank; and that the amount collected by taxation, by reason of such mode of assessment, from the plaintiff and his assignors, upon their shares of the National Bank, was larger, in proportion to the actual value of the shares, than the amount collected

by taxation from the owners of shares of the State bank, in proportion to actual value. (Finding 31, pp. 19, 20.)

The plaintiff resided and was assessed for personal property in the Fourteenth ward, and his shares in the National Exchange Bank were assessed to him in the Sixth ward. (Finding 7.) Four of his assignors were residents of the Sixth ward, and assessed for personal property in addition to the assessments upon their stock in the National Exchange Bank. (Finding 13.)

The Mechanics and Farmers' Bank and the National Exchange Bank had made their reports in 1874, as required by the State and national laws respectively, showing their respective capital, surplus and financial condition, and these reports had been published in a public newspaper of the city prior to September 1, 1874, the time of assessing. (Finding 11, p. 17.)

There was in 1874 an individual banker doing business under the laws of this State, whose bank was located in the Sixth ward, but who resided out of the city of Albany. His capital invested in the banking business was $100,000. Neither the bank nor its owner was assessed or taxed in the city of Albany. (Finding 14.) The defendants did not in 1874 assess or attempt to assess for purposes of taxation any individual banker, as such, in the city of Albany, pursuant to chapter 761 of the Laws of 1866. (Finding 15.)

There were in Albany in 1874 many corporations other than banks owning personal property. None of the shareholders in these corporations were assessed on their shares therein. Some of these corporations were assessed and taxed, but none of them on their entire capital. Some of them were allowed deductions by reason of their property being invested in United States securities. Most of the shareholders of these corporations were residents of the State of New York. (Finding 16, p. 17.)

There were in Albany in 1874 several building, mutual, loan, and fund associations organized under chapter 122 of the Laws of 1851. Some of them had large amounts of

money loaned on bond and mortgage. One of them had about $50,000 so loaned. None of these associations were assessed or taxed in 1874, nor were any of the members thereof assessed or taxed on their interest or shares in the associations. (Finding 17.)

Real estate in the city of Albany was, in 1874, assessed at only about forty or fifty per cent of its actual value. (Finding 18, p. 18.) Shares of State banks in various parts of the State, namely, in Cohoes, Schenectady, Binghamton, Amsterdam and Utica were assessed, in 1874, at from twenty-five per cent to fifty per cent of their par value, although the actual value of such shares in all cases equaled, and in several cases exceeded their par value. Personal property in these cities was, in 1874, assessed at from one-seventh its actual value (in Utica) to forty per cent of such actual value (in Amsterdam). (Finding 19 to 23 inclusive, p. 18.) There were in the city of New York, in 1874, two large trust companies, each having a capital of $2,000,000. None of the shareholders of either of these companies were, in 1874, assessed or taxed on their shares, though a large portion of them resided in the State of New York. The United States Trust Company was assessed and taxed on only $600,000 personal property and $400,000 for real estate. The National, which held $3,500,000 of deposits, was entirely exempted from taxation for personal property. The deduction in the one case and the exemption in the other were by reason of the investment of the personal property of the corporation in United States securities. (Findings 24 and 25, pp. 18, 19.)

Personal property throughout the State, in 1874, was assessed at unequal rates in the various counties, ranging from one-third, or less, of its actual value in some counties to about four-fifths of such actual value in others. (Finding 26, p. 19.) The rates of such assessment in the various counties are found in detail by the referee in his first additional finding, on page 24. The rate of assessment upon personal property varied from twenty-six per cent of its actual value in Schuyler

county to eighty-eight per cent in Kings. In a majority of the counties such assessment was at less than fifty per cent of the actual value. Bank shares (State and National) were the only kind of personal property in the State of New York, assessed by special list, separate from the other personal property of the owner or person assessed, and bank shares were so separately assessed throughout the State. (Finding 27, p. 19.)

Persons indebted were, by the laws of this State, entitled to a deduction of their indebtedness from the amount of their personal property, but owners of bank shares were not, under the laws of the State, as construed by the courts, entitled to such deduction from the value of their shares. (Finding 28.)

In the case of all corporations other than banks, the corporation itself was, in 1874, liable to assessment, and the shareholders were not so liable, and such other corporations were entitled, by the laws of the State, to a deduction, from the assessed value of their personal property, of the amount of their indebtedness and the amount of their investment in United States securities. (Finding 29.)

The defendants, as assessors, did not, in 1874, examine the records in the county clerk's office or surrogate's office, to ascertain property subject to taxation, nor did they make inquiries as to the rate at which moneyed capital in the State outside of the city of Albany, was assessed or taxed. (Finding 30.)

Upon these facts the referee found that the defendants, as such assessors, in making the assessments upon the shares held by the plaintiff and his assignors, in the national bank in question, had jurisdiction of the property, and of the persons and corporations assessed, and acted in good faith and without malice, and their proceedings were regular (finding 32, p. 20), and decided that the defendants were not liable in this action by reason of any of the matters or things proven therein, and that the defendants were entitled to judgment, dismissing the complaint with costs.

Judgment was entered in accordance with this decision by the New York Supreme Court (page 20), and affirmed by the Court of Appeals. The opinion of the Court of Appeals by Judge MILLER, may be found on pages 29 to 32.

ASSIGNMENT OF ERRORS IN No. 1047.

1. The court below erred in holding that the defendants, as assessors of the city of Albany, in making the assessment referred to in the report of the referee, had jurisdiction of the property and of the persons and corporations assessed.

2. The court below also erred in holding that the defendants were not liable in this action by reason of any of the matters or things proven therein.

3. The said court also erred, in that it did not hold that the defendants, as such assessors, in assessing the shares of the plaintiff and his assignors in the said national bank, acted without jurisdiction or authority, in that they disregarded the condition and restriction imposed by the laws of the United States, namely, that the taxation thereof should not be at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York.

4. That the said court erred in that it did not hold that the defendants, in making such assessments on such shares, acted without jurisdiction or authority, in that they did not include said shares in the valuation of the personal property of the owner thereof, as authorized by the laws of the United States, but made special assessments of said shares to the owners thereof, separate and distinct from the assessments of such owners for their other personal property.

5. That the said court erred in that it did not hold that the law of the State of New York, passed April 23, 1866, above quoted, is repugnant to, and a violation of, the Constitution and laws of the United States, and void so far as it authorizes the taxation of owners of shares of national banking associations, in that it provides for a separate and

distinct assessment upon the stockholders in such banking associations, of their shares therein in the town or ward where such banking association is located, and not elsewhere, whether such stockholder reside in such town or ward, or not; and, also, in that it permits no deduction for the indebtness of the owner from the assessment of such shares, such deduction for indebtedness being allowed from assessments upon all kinds of personal property and moneyed capital except bank shares.

6. That the Court of Appeals should have reversed the judgment of the Supreme Court of the State of New York on the grounds above stated; but that said Court of Appeals decided the contrary thereof, and affirmed the judgment of the Supreme Court of the State of New York.

POINTS.

FIRST. AS TO THE JURISDICTION OF THIS COURT:

There can be no doubt that both cases turned on Federal questions in the court below.

1. In No. 97, the plaintiff in error claimed that if the State Laws justified the refusal to deduct the relator's indebtedness from his assessment on his shares of national bank stock (as was held by the court), although as to all other personal property in the State including moneyed capital, other than bank stock, such deduction for indebtedness was required, that then such laws were in violation of the restrictions imposed by section 5219 of the Revised Statutes of the United States, and were, therefore, unconstitutional and void.

If we were right in regard to the unconstitutionality of these State laws we were entitled to the relief asked for.

The statute of 1850, above quoted, was peremptory and required a reduction to be made unless the provisions of the law of 1866, which, as construed by the

courts of the State of New York, justified the refusal, were valid and created a legal exception to the general rule.

2. It is equally clear that the decision in No. 1047 turned upon a Federal question. The defendants, as assessors, disregarded the restrictions imposed upon them by section 5,219. We claimed that in consequence of such disregard, they failed to acquire jurisdiction to assess the shares in a national bank owned by plaintiff and his assignors. Such claim was based upon the provisions of section 5,219. We claimed, also, that the law of April 23, 1866, under which the defendants acted in making such assessment, was repugnant to, and a violation of, the Constitution and laws of the United States, upon the grounds heretofore stated. Judgment could not have been rendered for the defendants without overruling both these propositions. The Court of Appeals admitted, in this case, that if there was an entire lack of jurisdiction, the defendants were clearly liable (page 30).

The same court had repeatedly decided this proposition.

See Mygatt v. Washburn, 15 N. Y., 316.
Dorwin v. Strickland, 57 N. Y., 492.
National Bank of Chemung v. Elmira, 53 N. Y., 49.

SECOND. The judgment in case No. 97 was erroneous.

1. The decision in this case was made upon the authority of the case of People ex rel. Cagger v. Dolan and others, decided by the same court, when differently constituted, in 1867, and reported in 36 N. Y., 59.

Although that decision was by a divided court (Justice Porter and Bockes dissenting, p. 69), the present Court of Appeals felt constrained to follow it, inserting in their judgment that their judgment was rendered upon this authority. (See record of judgment on page 8.)

The decision in 36 N. Y., was made in a case arising, like this, in the city of Albany, necessarily involving the same question here presented. It is discussed, however, in the reported opinions, mainly, upon the construction of the State law. The judges who delivered the opinion of the court did not, in their opinions, consider whether the State law was in violation of the act of Congress. That case arose before the enactment of the Revised Statutes, and when the national banking act, so called, of 1864, was in force. This decision settles the law as to the construction to be given to the statutes of the State of New York. It shows conclusively that State assessors, while they are required to make a deduction for indebtedness from the assessment made upon the owners of every species of personal property other than bank stock, including moneyed capital, have no right under the New York statutes to make such deduction where the assessment is upon national bank shares. That this is a discrimination against this particular species of property cannot be questioned. The question to be determined is, whether such adverse discrimination is a violation of the provisions of the federal law. We claim that it violates the provision that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

In regard to all moneyed capital other than bank stock, a deduction for indebtedness was required by the State law, and was actually made by these defendants. (See record, p. 5.) In regard to this particular species of property, the State law required the assessors to

refuse such deduction, as was decided in The People v. Dolan, and as the assessors did in this case.

The intention of the United States statute is declared by this court to have been "to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power."

Adams v. Nashville, 95 U. S. (5 Otto), 19, 22.

It is evident that the law of the State of New York, as construed by its highest court, does make such "unfriendly discrimination." A person indebted can hold, under the laws of the State of New York, any species of personal property, including moneyed capital, other than bank stock, without paying any tax thereon, provided such property does not exceed in value the amount of his indebtedness; but if he invests his money in national bank stock, although he may owe more than the amount of property so owned, he is liable to be taxed therefor, without any deduction or allowance.

This is not a case of partial exemption only, which was held by this court to be valid in the case of Hepburn v. The School Directors (23 Wall., 480). In that case it was shown that certain securities, mortgages, judgments, etc., were, in a certain borough of Pennsylvania, exempt from taxation; and it was claimed that such exemption made the taxation of national bank shares in the same borough invalid; but the court say, on page 485, "This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. * * * It could not have been the intention of Congress to exempt bank shares from taxation because *some* moneyed capital was exempt."

In this case the exemption of persons indebted from taxation was general, as to owners of all property except

bank stock. No kind of moneyed capital, except that invested in the stock of banks, can be taxed in the State of New York, where the person owning it is indebted in an amount equal to such moneyed capital held by him. It is a matter of notoriety that, in a commercial State like New York, for the last few years, the majority of persons holding personal property are, more or less, in debt; and it is submitted that a State law, which exempts national bank stock from the general rule, and makes it taxable at its actual value in all cases, without reference to the indebtedness of its owner, while every other kind of moneyed capital is exempt from taxation when held by persons indebted in an amount equal to its value, is a direct violation of the restriction of the Federal law, creating a hostile and unfriendly discrimination against this species of property.

The question involved in this case came before the United States Circuit Court in Kentucky, in the case of the City National Bank v. Paducah (5 Cent. Law Journal, 347; Thompson's National Bank Cases, 300), and it was there held that where other moneyed capital than bank stocks was taxed at the same rate with bank stocks, but with a provision that from the amount of this capital the entire indebtedness of the owner should be deducted before the assessment was made, and no such deduction was allowed, where such capital consisted of shares in national banks, the tax upon such shares was invalid.

THIRD. *This and the following points are mainly applicable to case No.* 1047.

It is conceded by the court below, and must be regarded as settled, as well by this court as by the courts of the State of New York, that the defendants, as

assessors, violated the law in the mode adopted by them for assessing bank shares in the city of Albany, viz.: by assessing them at their par value without reference to their actual value.

Hepburn v. The School Directors, 23 Wall., 480.
The People v. Commissioners, 67 N. Y., 516.
The People v. The Assessors, 2 Hun (N.Y.), 583.

And it is found in this case, by the referee, that by reason of such erroneous mode of assessment, the rate of taxation imposed upon the shares of the plaintiff and his assignors, was greater than that imposed by defendants upon other moneyed capital in the hands of individual citizens of the State. (See finding 31 in connection with findings 1, 8, 10 and 12.)

FOURTH. But it is found by the referee and held by the courts of New York, that the defendants, as such assessors, in making the assessments complained of, had jurisdiction of the property, and persons and corporations assessed, and acted in good faith and without malice, and that their proceedings were regular (finding 32), and therefore, that they are not liable in this action.

This raises the important question in this case:— *Had* the defendants, as assessors of the city of Albany, jurisdiction to make such assessments? If they acted without jurisdiction, either of the person, or of the property owned, their action was void, and they are liable.

Mygatt v. Washburn, 15 N. Y., 316.
Dorwin v. Strickland, 57 N. Y., 492.
National Bank of Chemung v. City of Elmira, 53 N. Y., 49, 59.

FIFTH. It is insisted on the part of the plaintiff in error that the defendants, in making the assessments in question, acted without jurisdiction, and are liable for the damages resulting from such assessments.

1. The capital of the National Exchange Bank, or its equivalent, was all invested in bonds of the United States.

2. It is well established by a long series of decisions of this court, that a tax imposed by any State, without the permission of Congress, directly or indirectly, upon any bonds or other securities issued by the United States government, is unconstitutional and void.

McCulloch v. Maryland, 4 Wheat., 426.
Osborne v. Bank of U. S., 9 id., 738.
Weston v. City of Charleston, 2 Peters, 449.
Bank of Commerce v. N. Y., 2 Black, 628.
Bank Tax Case, 2 Wall., 200.
Van Allen v. The Assessors, 3 id., 573.

3. The national banking act (chap. 106, of 1864) permitted that such shares, might be included in the valuation of the personal property of the owner in the assessment of taxes imposed under State authority, subject to the limitations that the amount should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State, and that the tax imposed should not exceed the rate imposed upon the shares of any State bank.

See 13 U. S. Stat. at L., 112, § 41.

4. This court, in Van Allen v. The Assessors (*supra*), held unanimously that a State tax upon shares of a national bank not imposed in conformity with these limitations, was void.

See Mr. Justice Nelson's opinion, 3 Wall., 581.
See Chief Justice Chase's opinion, id., 588.

As the chief justice says in his dissenting opinion: "We do not understand the majority of the court as asserting that shares of capital invested in national securities could be taxed without authority of Congress." Page 593.

5. The Revised Statutes of the United States (enacted June 22, 1874), re-enacting substantially the forty-first section of the national banking law of 1864, provide as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located, but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere."

R. S. of U. S., p. 1015, § 5219.

NOTE. — That the omission of the special clause relating to the shares of State banks contained in the forty-first section of the Law of 1864, was not designed to change the law, but resulted from the fact that such clause was necessarily included in the term "other moneyed capital" is evident from sections 5595 and 5596 of the Revised Statutes, page 1091. The design of the revision was not to change the law but "to revise and consolidate the statutes of the United States in force on the first day of December, 1873." (See title of act.)

Shares in State banks owned by citizens are "other moneyed capital." (See Hepburn v. Directors, 23 Wall., 480, 484.)

6. The defendants, then, had no jurisdiction to assess the shares of the National Exchange Bank, unless they observed the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State." Disregarding it their action was void. The observance of this restriction was necessary to give them jurisdiction. This was expressly decided in the case of Van Allen v. The Assessors (*supra*).

7. The defendants, in fact, utterly disregarded this restriction. They did not inquire or endeavor to ascertain the actual or market value either of the National or the State Bank shares. (Finding 9.) Although the National Exchange Bank and the Mechanics and Farmers' Bank published reports in the public newspapers of the city of Albany, showing that one share of the State Bank was of more than double the value of a share of the National Bank, the defendants assessed both at their par value (excluding real estate), making the assessment upon a share of the National Bank actually greater than that upon a share of the State Bank, worth twice as much. In other words, the rate assessed by defendants upon plaintiff's "moneyed capital," invested in the National Exchange Bank, was double that imposed by them upon the "other moneyed capital in the hands of the individual citizens of the State," invested in the Mechanics and Farmer's Bank, a State institution.

8 The defendants did not act judicially in making these assessments. If they had endeavored, in good faith, to conform to the restrictions imposed by the law of Congress, perhaps this might have been said. It is

not necessary to contend that a mistake in judgment as to actual value would make them liable. But they made no inquiry, no effort. They assessed real estate at only forty to fifty per cent of its actual value. (Finding 18.) They did not inquire at what rate moneyed capital was assessed or taxed in other parts of the State. (Finding 30.) In fact, shares of State banks were assessed at from twenty five to fifty per cent of their actual value; personal property at from one-seventh of its actual value, in the city of Utica (finding 23, fol. 96) to eighty-five per cent in the city of New York. (Fol. 128.) In a majority of the counties of the State personal property was assessed at less than fifty per cent of its actual value. (See Table, page 24 of Record.) The defendants, if they did not know of these obvious, notorious facts, could easily have found them out. Omitting to make any inquiry, shutting their eyes to facts so public that they can almost be charged with judicial notice of them, they cannot be protected on the ground of "good faith." The law of the United States told them to inquire and see to it that the taxation imposed by them on national bank shares was not at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens of the State. They did not so inquire. They did assess such shares at a greater rate than "other moneyed capital." In the language of the Court of Appeals of New York, in another case "they simply decided to violate the statute; and while bad faith will not be imputed, we must assume that they did so voluntarily and intentionally; and yet such an act is claimed to be judicial, and therefore exempt from collateral attack."

53 N. Y., 59.

NOTE. The learned judge, who wrote the opinion of the Court of Appeals, entirely overlooked the proposition that it is only by observing the restric-

tions imposed by the federal law that the assessors acquire jurisdiction. He says: "There is no question that the assessors did have jurisdiction of the person of the plaintiff, and that they had jurisdiction to make some assessment on the shares of the plaintiff; but the point urged against the validity of the assessment is that they were assessed at a greater rate than was assessed upon other moneyed capital." But State taxing officers must comply with the restriction imposed by the Federal law, *in order to obtain jurisdiction* to assess the shares in a national banking association. The remarks, above quoted, would be sound, perhaps, if the only law making the restriction was a *State* law; but it is well settled, that without the permission of Congress the State authorities had no jurisdiction to assess this species of property, and the federal law has given the States this power, only upon the condition that the taxation shall not be at a greater rate than that assessed upon other moneyed capital. Assessors who disregard this restriction, and make no effort to comply with it, and in fact violate it by assessing this kind of property at a higher rate than other moneyed capital in the hands of individual citizens of the State, act without jurisdiction, and like other wrong-doers, are personally liable for the consequences of their acts.

9. There can be no question, upon the facts found by the referee, that the national bank shares of plaintiff and his assignors, were assessed at a higher rate than "other moneyed capital in the hands of individual citizens of the State." "Moneyed capital" certainly includes investments in stocks, bonds or other securities.

Waite, C. J., 23 Wall., 484.

The defendants themselves assessed the "moneyed capital," in the hands of the citizens of New York, stockholders in the Mechanics and Farmers' Bank, at

less than half the rate imposed upon these national bank shares. Moneyed capital in other parts of the State, was, as has been shown, assessed at a still lower rate.

The Supreme Court of Massachusetts has given a narrow construction to the limitation imposed by the law of the United States. Judge Ames says: "In our judgment, it satisfies the meaning of the restriction, if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located."

Providence Institution v. Boston, 101 Mass., 575, at page 585.

Even according to this construction, which is, we submit, entirely too narrow, and contracts the obvious meaning of the words of the law, the acts of the defendants must be condemned. For they assessed these national bank shares not only at a higher rate than the "moneyed capital" invested in the State bank referred to, but also at a higher rate than moneyed capital invested in the city of Albany, in a private bank (finding 14); in corporations other than banks (finding 16); in building and mutual loan associations (finding 17), or in real estate(finding 18).

It may be said that real estate is not "moneyed capital." But where money is invested in lands, it is difficult to see why such lands are not to be regarded as moneyed capital. The object of the statute in making the restriction was, in the language of this court, "to protect the corporations, formed under its authority, from unfriendly discrimination by the States in the exercise of their taxing power." (Adams v. Nashville, 95 U. S. [5 Otto], 22.) Such discrimination is obviously made by assessors when they say to capitalists "if you invest your money in real estate, we will assess it only at forty or fifty per cent of its actual value; if

you put in the stock of a State bank, we will assess it at its par value, which is only one-third of its actual value; but if you invest it in the shares of this national bank, we will assess it for taxation at seventy-five per cent of its actual value." As was remarked by the Supreme Court of Massachusetts, in the case above cited, "If this objection (that the tax in question is not proportional) should prove to be well taken, the tax is illegal and void."

101 Mass., 585.

10. It was held by the Court of Appeals, in this case following the *dictum* of Judge Hunt, in The People v. Dolan (36 N. Y., 59, 67), that the word "rate" in the laws of the United States refers to the rate at which the tax is laid by the board of supervisors after the assessment. (See Judge Miller's opinion, pp. 30 and 31 of Record.) But this construction of the law renders the restriction entirely nugatory; and the decision of this court in Van Allen v. The Assessors (*supra*) is conclusive against it. The reversal in that case was upon the ground that under the law of 1865 a larger proportion of the value of the shares of the national bank was assessed than was imposed by *assessment* on the shares of the State banks. There was no pretense in that case that a greater *per centage* of tax was imposed upon the amount at which the national bank shares were assessed than upon the amount at which State bank shares were assessed.

It may be claimed that the case of The People v. The Commissioners (4 Wall., 244), is in conflict with this view. But an examination of the opinion in that case, with reference to the facts on which it was founded, will show that it is not. It was claimed there that the State tax was invalid, because under the law a deduction was made in the case of individuals and corporations other than banks, on account of U. S. securities

held and owned by them, which was disallowed to shareholders in national banks, and it was claimed that this was a violation of the first limitation in the forty-first section of the Law of 1864. The Supreme Court held that it was not, and in doing so, it simply, in effect, repeated its decision in the case of Van Allen, and adopted the rule contended for by the counsel for the defendants in error, that the words "moneyed capital" referred only to such moneyed capital as is liable to assessment. (P. 252.) Judge Nelson says: "The meaning and intent of the lawmakers were, that the rate of taxation of the shares should be the same, or not greater than upon other moneyed capital of the individual citizen *which is subject or liable to taxation*." (P. 256.) He nowhere says, nor has any court before this case decided, that a deliberate assessment of the shares of a national bank, at their full value, while the shares of a State bank are assessed at only one-third their value, is not a violation of the restriction in the law of the United States, although some isolated expressions of judges, in some cases considered by themselves, and without reference to the facts before them, may, perhaps, be perverted to express such a meaning. Such a construction would entirely destroy the effect of the restriction as a protection against hostile discrimination in taxation. The object of the limitation evidently was to prevent the imposition of a tax upon shares of the stock of national banks which should bear a greater proportion to the actual value of such shares than the tax imposed upon other taxable moneyed capital in the hands of individual citizens bears to the actual value of such moneyed capital. Whether such inequality arises from the *assessment* of the national bank shares at a greater rate than that of other moneyed capital, or from a taxation at a greater rate upon an equal assessment, it violates the provisions of the law of the United States. And the farthest any court

has gone (except in this case), in upholding such assessments when claimed to be unequal, is that such limitations are not violated when an *exemption* is allowed in the one case which is not in the other. The *rate of assessment*, with reference to *actual value* must be the same in all cases. The restriction must apply to the *rate of valuation*, as well as to the rate or percentage of tax upon the assessed value, or it is utterly worthless and ineffectual.

SIXTH. The acts of the defendants in making the assessment in question, have been shown to be in disregard and violation of the restriction imposed by the law of the United States. So far as the State law is concerned, the Court of Appeals has decided that, although the basis of the assessment was erroneous, still the assessors acted judicially, and were not liable to action. (Record, pages 29, 30.)

The Supreme Court of New York had before decided, in regard to this very assessment, when remedy was sought by *certiorari*, that, although the assessment was illegal, there were considerations of convenience and public policy that prevented its reversal. (People ex rel. Williams v. The Assessors, 2 Hun, 583.)

It is decided then, by the courts of New York, that there is no power under the laws of that State to prevent assessors from disregarding and violating the restriction imposed by Congress upon the power of a State to tax national bank stock. In other words, it is decided that, under the laws of the State of New York, assessors may tax national bank stock at a greater rate than other moneyed capital, and that although such taxation is erroneous, the person thus assessed has no remedy. The courts refuse to correct

these manifest errors on *certiorari*, because of inconvenience.

People v. Assessors, 2 Hun, 583.
People v. Delaney, 49 N. Y., 655.

When remedy is sought by action the courts say that, although the assessors wholly disregarded the law of Congress, made no inquiry whatever as to the actual value of national bank shares, or as to their value compared with other moneyed capital, still they cannot be made liable, because they acted judicially.

If this reasoning is correct, and shall be followed by this court in the construction of the Federal law, the restrictions imposed by Congress upon the States in respect to the taxation of national bank stock are entirely inoperative. There is no State in which such restrictions cannot be practically annulled. The taxing officers may, as in this case, wholly disregard them. State courts may hold that their action cannot be reviewed, or they be held liable for the results of their acts. The consequence will follow that, notwithstanding the provisions of section 5219, every State may assess and tax national bank stock at a greater rate than other moneyed capital, with perfect impunity.

The laws of the State of New York, as construed by the highest State court, *permit* assessors to violate with impunity the law of the United States in the assessment and taxation of national bank stock. Such laws are, therefore, unconstitutional and void, and are no protection to State taxing officers who have violated the federal law, and thus imposed unlawful burdens on the owners of national bank stock.

SEVENTH. The rule of uniformity of taxation, is a rule of equity and justice. The object of the restriction im-

posed upon the State authorities by Congress, in the taxation of national bank shares, was to secure uniformity as between such shares and other moneyed capital. The same object is sought by the general laws of the State of New York relating to assessment. The assessment of real and personal property is required to be "at its full and true value." (1 N. Y. R. S., 393, § 17.) Assessors are required to make oath that they have estimated the value of the real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor, and also that the assessment roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above his debts and excluding exempt property, etc., at *the full and true value thereof*, according to their best judgment and belief."

Chap. 176 of 1851; 3 N. Y. St. at Large, 350, § 8.

If such oath is omitted, or made prematurely, or if it varies from the language of the statute, the assessment is void, and insufficient to protect even the collector who attempts to collect a tax under it.

Van Rensselaer v. Witbeck, 3 Seld, 517.
Westfall v. Preston, 49 N. Y., 349.

Similar statutes exist in Wisconsin, and the Supreme Court of that State has decided (1) that the absence of the affidavit required by statute to be annexed to the assessment roll was fatal to the assessment. (Marsh v. Supervisors of Clark Co., decided October 23, 1877; see 5 Reporter, 473); and (2) that if such affidavit was annexed, but was *untrue, in fact*, property having been assessed at only one-third of its real value, the assessment was illegal and void. (Schettler v. City of Port

Howard, decided 1878; 5 Reporter, 510.) In the last case the chief justice says: "If assessors should be suffered to substitute a rule of their own for the rule of the statute, and yet to uphold their assessments by an oath that they have followed the statutory rule, it appears to me not extravagant to say that taxation in this State would rest less upon a uniform rule of assessment than upon a uniform rule of fraud and perjury."

In this case it appears as a fact, not only that the defendants did not assess all property, real and personal, at its full and true value, but that in consequence a discrimination was made against national bank shares, and the law of the United States, as well as the State law, was violated. Such violation did not arise from a mere error or mistake in the exercise of their judgment as to such full and true value. The defendants did not try to ascertain the actual value of the bank stock. In regard to real estate they deliberately and intentionally assessed that species of property at only forty or fifty per cent of its true value. In this respect they acted illegally. The result of this wrongful act was the damage to the plaintiff and his assignors, for which this action is brought.

The questions involved here have recently been passed upon by the Circuit Court of the United States for the northern district of Ohio, in the case of the Merchant's National Bank of Toledo against Cumming, treasurer of Lucas county. In that case a decree was made permitting the complainant to pay to the defendant forty per cent of the amount of tax assessed against its shareholders, and, on this being done, perpetually enjoining the collection of the balance. Judge Baxter, in his opinion, says:

"It very satisfactorily appears that complainant's capital stock was assessed for the year 1876 at its full value, while all other property was assessed at from thirty to forty per cent only of its real value, and that

by reason of this unequal assessment complainant's capital stock was in the hands of its shareholders, onerated with an undue proportion of the public taxes. It is not important to inquire into the methods leading to such a result. Whether from inadvertence or design, the consequences are the same to the complainant. It is an injustice that contravenes the Constitution of Ohio, as well as the provisions of the National banking law."

See Albany Law Journal, May 4, 1878 (vol. 17, p. 345); S. C., Thompson National Bank Cases, 926.

See, also, City National Bank v. The City of Paducah, U. S. Circuit Court Kentucky, reported in Thompson's National Bank Cases, 300.

EIGHTH. The action of the defendants in making the assessments complained of was illegal and in violation of the law of the United States, because it was done by special and separate list, applied to no other kind of property than bank stock, and not by including the value of the shares "in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located." The learned judge who wrote the opinion of the court below was mistaken in saying that that there was no finding as to this separate and special list (Record, p. 31). He had evidently overlooked finding 27, page 19.

R. S. of U. S., p. 1015, § 5219.

1. The act of June 3, 1864 (13 U. S. Stat. at Large, 111) provided that nothing in the act should be construed to prevent such shares "from being included in the valuation of the personal property" of the owner in the assessment of taxes imposed by State authority

at the place where such bank was located, and not elsewhere."

Some difference arose in the State courts as to the meaning of the word "place" as above used, some holding that it meant the taxing district, and some that it meant the State.

Congress, by the act of February 10, 1868, provided that the word should be construed to mean "the State within which the bank is located."

15 U. S. St. at L., p. 34.

And the statute of 1868, which was followed by the Revised Statutes, provided that "the legislature of each State may determine and direct the manner and place of taxing such shares," subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association, owned by non-residents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere."

R. S. of U. S., § 5219.

2. The law of the State of New York authorizing taxation of bank shares, provides that "said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes, at the place, town or ward, where such bank or banking association is located, and not elsewhere."

Laws of 1866, ch. 761, § 1.

The same law provides for the keeping of a full and correct list of the names and residences of all the stockholders, and the number of shares held by each, and makes such lists subject to the inspection of assessors of taxes. (Id., p. 1648, § 3.) It also makes it the duty of the bank to retain so much of the dividend or divi-

dends belonging to each stockholder, as may be necessary to pay the taxes on the shares so assessed.

Id., § 6.

3. Under this law of the State it will be seen that it is impossible for any share of bank stock to escape taxation. The bank must keep a full and correct list of stockholders. It is made subject to the inspection of the assessors. And the bank is required to retain a sufficient sum from the dividend of each stockholder to pay the tax.

4. Under the laws of the State, no shareholders in any corporations other than banks were in 1874, liable to taxation on such shares; in all cases except banks, the corporation itself was liable to assessment and taxation, and was entitled to a deduction from the assessed value of its personal property, of the amount of its indebtedness and also the amount of its investment in U. S. bonds. (Finding 29.) Bank shares were the *only* kind of personal property assessed for purposes of taxation by special list, separate from the other personal property of the owner.

Finding 27.

5. Personal property other than bank stock did, under the practical operation of the laws of the State, in many cases, escape taxation altogether. This appears from the fourteenth, fifteenth, sixteenth, seventeenth, twenty-fifth and thirtieth findings of the referee. It also appears from the annual reports of the State assessors to the Legislature, of which the court will take judicial notice. In their report of January, 1874, they say they are satisfied that less than fifteen per cent of the personal property in the State, liable to taxation, finds a place on the assessment rolls. (P. 6.) (See their reports for 1875, 1876 and 1877.)

6. In regard to no other kind of property than bank stock, do the laws of this State make requirements which *ensure* its assessment for taxation. In no other case is the owner of the property, or his agent, compelled to furnish for the inspection of the assessors a "full and correct" statement of the amount or value.

In the law applicable to the city of Albany, the assessors are required to "ascertain by diligent inquiry," all the taxable property, etc.

Ch. 86 of 1850, § 5.

And the same requirement is made of assessors throughout the State.

R. S., 390, § 8.

But "dilige nt inquiry" alone cannot discover *all* the personal property liable to taxation, especially intangible property like m oneyed capital invested in bonds or other securities.

7. In so far, then, as the law of 1866 requires from banks a full and correct list of their shareholders, and of the number of shares held by each, and requires the shareholders to be assessed in *the town or ward* where the bank is located, and not elsewhere, it makes an unfriendly discrimination against this species of property, and violates the national law and is void. It is not justified by the permission to "include" such shares "in the valuation of the personal property of the owner or holder;" nor by the permission to the State Legislature to determine and direct the manner and place of taxing the shares; for both these permissions are subject to the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens;" and the necessary, as well as the conceded actual result, of the requiring a "full and correct list" of the holders of

bank stock, and making no such requirements in regard to any other personal property or moneyed capital, is that bank stock is assessed at a "greater rate" than "other moneyed capital;" that *no* bank stock can escape taxation, while in many cases "other moneyed capital" can and does so escape. This was the very ground upon which the law of 1865 was held unconstitutional in the case of Van Allen v. The Assessors (*supra*).

NINTH. Four of the assignors of the plaintiff resided in the Sixth ward, where the bank was located. They, as well as the plaintiff and his other assignors, were assessed by defendants on a separate and special list; two of them paid taxes on assessments for personal property, in addition to the tax on their bank stock. (See finding 13, p. 17.)

In assessing these parties by a separate and special list, the defendants violated the law of the United States.

The law of 1850 requires the assessors of the city of Albany to prepare an assessment roll for each ward in the city, and to put opposite the name of each inhabitant of the ward "the *full* value of *all* the taxable personal property owned by such inhabitant" after deducting debts, etc.

Laws of 1850, ch. 86, p. 126, § 6, sub. 4.

This mode of making two separate assessments of the personal property of an individual residing in the same town or ward where the bank is located, is not justified by the permission in section 5219 to include the bank shares in the valuation of the personal property of the owner.

The amounts collected of these four assignors by reason of such illegal assessments were, from William J. Blackall, sixty-seven dollars and seventy-nine cents; the Commerce Ins. Co., $379,38; Adam Shields, fourteen dollars and fifty-two cents; Francis Vail, seventy-two dollars and sixty-three cents. (Pages 9, 10.)

TENTH. The law of 1866 is, also, unconstitutional and void, because it does not permit a deduction for indebtedness from any assessment for bank stock, such deduction being allowed for every other species of personal property. (Finding 28; People v. Dolan, 36 N. Y., 59.) And also because owners of bank shares alone were not entitled to any deduction from the assessed value of their shares by reason of the capital or property of the bank being invested in United States securities; such deduction being allowed in the case of all other corporations. (Finding 29; see third point, *supra.*)

ELEVENTH. The acts of the defendants being illegal, unauthorized, in violation of the laws of the United States, and without jurisdiction, the right of the plaintiff to recover the damages sustained by reason of such unlawful act cannot be questioned.

Addison on Torts, 1.
1 Hilliard on Torts, 94.
Mygatt v. Washburn (*supra*).
Dorwin v. Strickland (*supra*).
Rigby v. Hewitt, 5 Exch., 243.

Indeed, this proposition is conceded by the court below. (Record, page 30.)

TWELFTH. The judgment of the Court of Appeals in each case should be reversed. In case *No.* 97, judgment should be rendered that the relator is entitled to the peremptory mandamus for which he asked. In *No.* 1047, a new trial should be ordered in the court below.

MATTHEW HALE,
Attorney for Plaintiff in Error.

GEO. F. EDMUNDS,
Of Counsel.

A.

An Act authorizing the taxation of stockholders of Banks, and the surplus funds of Savings Banks.

Section 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and levied on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder, in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town or ward, or not, but not at a greater rate than is assessed upon the other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association, but the same shall be subject to State, county, municipal and other taxation to the same extent and rate and in the same manner as other real estate is taxed.

§ 2. (Relates to individual bankers.)

§ 3. There shall be kept at all times in the office where the business of such bank or banking association, organized under the authority of this State or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders therein, and of the number of shares held by each; and such list shall be subject to the inspection of the officers authorized to assess taxes during

the business hours of each day in which business may be legally transacted.

§ 4. Repeals former laws.

§ 5. When the owner of stock in any bank or banking association organized under the laws of this State or of the United States, shall not reside in the same place where the bank or banking association is located, the collector and county treasurer shall, respectively, have the same powers as to collecting the tax to be assessed by this act as they have by statute, when the person assessed has removed from the town, ward or county in which the assessment was made; and the county treasurer, receiver of taxes or other officer authorized to receive said tax from the collector, may all, or either of them, have an action to collect the tax from the avails of the sale of his shares of stock and the tax on the share or shares of said stock shall be and remain a lien thereon till the payment of said tax.

§ 6. For the purpose of collecting such taxes, and in addition to any other law of this State, not in conflict with the Constitution of the United States, relative to the imposition of taxes, it shall be the duty of every such bank or banking association and the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed, in pursuance of this act, until it shall be made to appear to such officer that such taxes have been paid.

§ 7. Relates to savings banks.

§ 8. This act shall take effect immediately.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHAUNCEY P. WILLIAMS, PLAINTIFFS IN ERROR,

against

WILLIAM J. WEAVER, EDWARD BRENNAN AND ROBERT H. WEIR, CONSTITUTING THE BOARD OF ASSESSORS OF THE CITY OF ALBANY, DEFENDANTS IN ERROR.

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

against

WILLIAM J. WEAVER, EDWARD BRENNAN AND ROBERT H. WEIR, DEFENDANTS IN ERROR.

These cases come before this court upon writs of error to the Court of Appeals of the State of New York, sued out to obtain a review of the determinations of the latter court, upon a state of facts agreed on in the first-entitled action, and upon the findings of fact of a referee in the second-entitled action.

The first action was brought to this court by writ of error and return thereto, filed March 1, 1876, and the second filed

December 18, 1878, and have been ordered to be argued together by this court. They both involve questions of taxation of the shares of stock held by individuals in national banks. Each case presenting different questions arising under the Revised Statutes of the United States, relative to such taxation, and also in the former, under a statute of the State of New York, relative to exemption from taxation.

FACTS AS TO FIRST ABOVE-ENTITLED ACTION.

The relator, Chauncey P. Williams, on the 1st of September, 1875, was a resident of the Fourteenth ward of the city of Albany, and the owner of shares of capital stock of the National Albany Exchange Bank, located in the Sixth ward of said city. The greater portion of the property of the bank consisted then of United States bonds, deposited pursuant to law with the treasurer of the United States. The defendants on the first of September, 1875, were (and remained so at the time of the submission, October 25, 1875), assessors of the city of Albany, and as such they assessed Mr. Williams in the Sixth ward (where the bank was located), at the sum of $38,250 on his bank shares in said bank, notwithstanding the fact that the relator made an affidavit that the value of his personal estate, including his bank stock, after deducting his just debts and his property invested in the stock of corporations or associations liable to be taxed therefor, "*and my investments in the obligations of* "*the United States*, does not exceed the sum of one dollar," and the relator demanded that his assessment be reduced to the sum of one dollar, which was refused. The section of the act under which the above affidavit and demand were made, is section 9 of article 2 of chapter 86 of the Laws of New York, passed in 1850 (Laws of 1850, page 127, section 9), and is as follows:

"If any person shall, at any time before the assessors "shall have completed their assessments, make affidavit that "the value of his real estate does not exceed a certain sum,

" to be specified in such affidavit; or that the value of the " personal estate owned by him, after deducting his just " debts and his property invested in the stock of any corpo- " ration or association liable to be taxed therefor, does not " exceed a certain sum, to be specified in the affidavit, it " shall be the duty of the board of assessors to value such " real or personal estate, or both, as the case may be, at the " sum specified in such affidavit and no more."

This is similar to the general law of the State, the act from which the above section is taken, applying only to the city of Albany.

In all cases other than with bank shares, upon an affidavit the same in form as made by the relator herein (excepting as to the allegation excluding the affiant's investments in the obligations of the United States), the assessors reduced the assessment to the amount demanded.

The law of the State under which the assessors acted in making their assessment upon the shares of the relator's bank stock, is as follows (Laws of New York, 1866, vol. 2, page 1647.):

"Section 1. No tax shall hereafter be assessed upon the "capital of any bank or banking association organized under "the authority of this State, or of the United States, but "the stockholders in such banks and banking associations "shall be assessed and taxed on the value of their shares of "stock therein; said shares shall be included in the valua- "tion of the personal property of such stockholder in the "assessment of taxes at the place, town, or ward where such "bank or banking association is located, and not elsewhere, "whether the said stockholder reside in said place, town or "ward, or not, but not at a greater rate than is assessed upon "other moneyed capital in the hands of individuals in this "State. And in making such assessment there shall also be "deducted from the value of such shares such sum as is in "the same proportion to such value as is the assessed value "of the real estate of the bank or banking association, and "in which any portion of their capital is invested, in which

"said shares are held, to the whole amount of the capital "stock of said bank or banking association. And provided "further, that nothing herein contained shall be held or "construed to exempt from taxation the real estate held or "owned by any such bank or banking association; but the "same shall be subject to State, county, municipal and other "taxation to the same extent and rate and in the same man-"ner as other real estate is taxed."

* * * * * * *

"§ 3. There shall be kept at all times in the office where "the business of such bank or banking association, organ-"ized under the authority of this State or of the United "States, shall be transacted, a full and correct list of the "names and residences of all the stockholders therein, and "of the number of shares held by each; and such list shall "be subject to the inspection of the officers authorized to "assess taxes during the business hours of each day in which "business may be legally transacted."

At the time of the submission of this controversy to the Supreme Court of New York (October 25, 1875), the assessment roll, upon which relator's assessment was placed, was in the hands of defendants and under their control.

But by the act under which the assessors make assessments in the city of Albany, they deliver their rolls on or before the first day of November, in each year, to the supervisors of the several wards. Such act is to be found in Laws of New York for 1850, page 125, and the section of such act herein referred to, is the twentieth, at page 129, and reads as follows:

"§ 20. The assessment rolls thus certified, shall on or "before the first day of November in every year, be de-"livered by the board of assessors to the supervisors of the "several wards in the city of Albany, respectively, who shall "deliver the same to the board of supervisors at their "meeting."

The relator claims that he should have been allowed the deduction demanded by him, and that the statute of 1866,

above quoted, did not justify the assessors in their refusal of his demand, or that if it would otherwise justify such refusal, the statute was itself in conflict with a law of Congress (R. S. § 5219), which is as follows:

"Nothing herein shall prevent all the shares in any asso-
"ciation from being included in the valuation of the per-
"sonal property of the owner or holder of such shares, in
"assessing taxes imposed by authority of the State within
"which the association is located; but the legislature of
"each State may determine and direct the manner and place
"of taxing all the shares of national banking associations
"located within the State, subject only to the two
"restrictions, that the taxation shall not be at a greater rate
"than is assessed upon other moneyed capital in the hands
"of individual citizens of such State, and that the shares of
"any national banking association owned by non-residents
"of any State shall be taxed in the city or town where the
"bank is located, and not elsewhere. Nothing herein shall
"be construed to exempt the real property of associations
"from either State, county or municipal taxes, to the same
"extent, according to its value, as other real property is
"taxed."

These are substantially the facts in the first action.

As to the second action, the action is brought against the defendants to recover from them personally some thirteen thousand dollars and interest from April 30, 1875, by reason of an alleged illegal and unauthorized assessment of plaintiff and his assignors, upon their shares in the stock of the National Albany Exchange Bank. The defendants claim that their assessments were legal, and also that they acted in a judicial character in making such assessments, and that they were entitled to the immunities incident to such character. The facts are correctly set forth in the report of the referee. The judgment entered upon his report was affirmed by the Supreme Court and by the Court of Appeals, and from such latter judgment the plaintiff sues out a writ of error to this court.

POINTS TO FIRST ACTION.

FIRST. In no event can the plaintiff be entitled to the writ of mandamus in the first action.

(*a.*) By the act above quoted it became the duty of the assessors to transmit the assessment roll of the Sixth ward to the supervisor thereof, on or before November 1, 1875, and the supervisor presented it to the board of supervisors at their next meeting in November, by whom the tax was carried out, and the warrant given to the receiver of taxes, and the tax collected.

(*b.*) All control and power over the roll thus passed from the assessors as soon as they delivered it to the supervisor. A mandamus never issues to any person, unless *at the time the writ is granted*, the person to whom it is directed has the power to perform the act commanded by the writ.

People v. Hayt, 66 N. Y., 606.
People v. Supervisors, 12 Barb., 217.

(*c.*) Hence, if the writ issued, it would have to command the defendants to reduce the relator's assessment to one dollar, upon an assessment roll which passed out of their hands, control and power, over three years ago, and the tax upon which assessment it is to be presumed has been paid, and spent by the city years since. The writ would thus command a physical as well as a legal impossibility.

SECOND. But the assessors were right, as matter of law, in refusing to comply with the relators's demand. And the State statute of 1866, forms a justification and defense to the assessors for their refusal.

(*a.*) The highest State court has held that the statute of 1866, does not give a right to the relator to have his assessment reduced as demanded.

People v. Dolan, 36 N. Y., 59.

(*b.*) Upon a question as to the proper construction of a State statute, this court follows the construction given to it by the highest court of the State where the statute was passed.

Tioga Railroad v. Corning Railroad, 20 Wal., 137.
Town of Ottawa v. Perkins, 94 U. S., 260.
Adams v. Nashville, 95 id., 19.

(*c.*) The relator did not comply with the statute, and hence was in no event entitled to the exemption. His affidavit contained an exception not permitted by the statute, for, in addition to, and explanation of, the facts required by the statute, he stated that it was only after deducting his investments in the obligations of the United States, that his personal estate did not exceed one dollar above his debts. This deduction was not allowed by the statute, and hence the affidavit was not a compliance with its terms.

THIRD. But assuming the affidavit was a compliance with the statute, then the only question remaining is, whether the above statute is in violation of the laws of the United States, and especially of section 5219 of the Revised Statutes, already quoted. We contend it is not, and that this court has several times decided this principle.

(*a.*) By the act of Congress, it was not intended to curtail the power of the States on the subject of taxation, or to prohibit the exemption of par-

ticular kinds of property, but to protect the corporations, formed under its authority, from unfriendly discrimination by the States in the exercise of their taxing power.

Van Allen v. The Assessors, 3 Wal., 573.
People v. Commissioners, 4 Wal., 244.
Bank v. Commonwealth, 9 id., 353.
Hepburn v. The School Directors, 23 id., 480.
Adams v. Nashville, 95 U. S., 19.

(*b.*) The ground upon which the claim rests in this case is, as relator alleges, that the State is prohibited from taxing shares in banks *at a greater rate* than is assessed upon other moneyed capital in the hands of individual citizens of such State. Of course, unless the proposition can be maintained that by this refusal of the assessors, the relator is taxed *at a greater rate* than is assessed upon other moneyed capital, etc., the claim is of no validity.

But no greater rate of taxation is caused by this refusal. Because, by reason of State laws, the amount of moneyed capital other than bank shares liable to taxation, is or may be decreased, the consequence does not follow that thereby the rate of taxation upon bank shares is greater than upon other moneyed capital in the hands of individuals. As is said in Hepburn's case (23 Wal.), all moneyed capital other than bank shares, is not necessarily exempt. Only so much is exempt as equals the indebtedness of the individual. The rest is not. And there may be such overplus.

If there is or may be, then "moneyed capital, "as such, is not exempt. Some part of it only "is. It could not have been the intention of "Congress to exempt bank shares from taxation "because some moneyed capital was exempt."

(*c.*) If this claim is void, then no exemption can be made by a State, of any property, without at the same time exempting these shares.

The exemption of a clergyman in New York is given to the amount of $1,500. It may be entirely personal property, in other words, *moneyed capital.* The claim of relator would then be that he must be exempted to the amount of $1,500 on his shares of bank stock, or else that he is taxed at a greater rate than other moneyed capital in the hands of the individual, and hence such tax would be void. The Congress never could have meant any such thing, and the decisions of this court, in the cases above cited, show that such was not the intention.

The argument for the defendants is also ably presented by Mr. Justice Hunt, when he was on the bench of the New York Court of Appeals, in the case of The People against Dolan (36 N. Y., *supra*).

POINTS AS TO SECOND ACTION.

First. There was no necessity for the decision of any Federal question in this case; and, without deciding any such question, the judgment, as rendered, could and would have been given. Consequently, this court will not review the decision of the State court.

(*a.*) The plaintiff complains of the action of the defendants in making the assessment in question, because, as he alleges, it was made contrary to the law of Congress, and hence without jurisdiction, by being made at a greater rate than upon other moneyed capital, etc. The defendants, in the first place, denied that the assessment

was made at a greater rate, etc., and hence that it was not in violation of any act of Congress; and, second, that even if it were in violation of any such law, and even if the assessment were therefore erroneous, it was an error judicial in its nature and for which they were not personally answerable to the plaintiff.

(*b.*) The court held, that although the basis of valuation (the par value of stock) adopted by the assessors was erroneous, yet they acted in a judicial capacity upon a subject that they had jurisdiction over, and hence they were not personally liable for their errors. The opinion also declares that the assessment was *not* at a greater rate, etc., and hence did not violate the act of Congress.

(*c.*) Under section 709 of the U. S. R. S., as construed by this court, the decision of a State court will not be reviewed in a case like this.

(1.) It may be assumed that a Federal question was raised and presented to the State court, and decided by that court against the right claimed or asserted by the plaintiff. Still there was another issue decided by the State court, to wit, that the assessors acted judicially, which was not a Federal question, and which was broad enough to maintain the judgment, notwithstanding it be assumed that there was error in the decision of the Federal question; and such being the case, the judgment must be affirmed without any examination into the soundness of the decision of the State court upon this

question of the irresponsibility of the assessors.

Murdock v. City of Memphis, 20 Wal., 590.
Moore v. Mississippi, 21 Wal., 636.

In latter case the court says, at page 639: "The demurrer to this plea was, "therefore, properly sustained upon this "ground." (Not a Federal question.) "Such being the case, it is a matter of "no consequence to us that the court may "have gone further and decided a Federal "question. *The decision of such a question was not necessarily involved in the "determination of the cause.*"

(2.) So that even if a Federal question were presented and passed upon by the court below, if it were not necessarily passed upon, and if there existed another question which would dispose of the whole case, the Supreme Court does not review that decision whatever it might think of the merits.

See cases cited, *supra*.
Brown v. Atwell, 92 U. S., 327.
McManus v. O'Sullivan, 91 id. 578.

It appeared in last cited case, however, that the State Court did not decide the Federal question, though one was presented.

(3.) I suppose, however, the plaintiff contends that a Federal question was necessarily passed upon, when the court decided the defendants had *jurisdiction* to make the assessment they did; the plaintiff contending they had no jurisdiction to assess

at a greater rate, etc., and that if they did (which would be a Federal question), the assessment would be void and hence the assessors personally liable.

(4.) The vice of this claim rests in the assumption that the assessors lose jurisdiction over a subject which otherwise they would have, because of an error in their judgment as to the value of certain stock, and from which error, as plaintiff claims, he is subjected to taxation at a greater rate, etc.,

Whether or not the assessors do lose jurisdiction by such an error in judgment, cannot be a Federal question, and it cannot become such even if it be conceded that by reason of such error the plaintiff is illegally taxed in violation of a law of Congress.

It is not a question whether the tax is erroneous, but whether in adopting an erroneous valuation of property the assessors lose jurisdiction and become personally liable. This, as I have said, is not a Federal question, but one of general law, as to how far assessors in New York are liable for erroneous assessments upon subjects over which they have jurisdiction, and whether, when they confessedly have jurisdiction to make some assessment, they lose it in making an erroneous one by a simple over or under valuation of the subject matter assessed; and whether they do or not, depends on no Federal matter, but on general principles of the law as held in New York.

(5.) That the assessors had jurisdiction to make *some* assessment upon the shares of stock held by plaintiff was conceded in the court below by plaintiff's counsel.

It was also (I think) conceded that if the assessors had examined with care the question as to the value of the shares of stock in the different banks in Albany, and had then come in good faith to the conclusion to value the shares as they did, and to assess as they did, that then the assessors would not be liable. Of course they would not be liable, on such admission, because they would have *jurisdiction*. If they had no jurisdiction they must be liable, and, if they are not liable, it is because they had jurisdiction.

It is thus seen that the question of *jurisdiction* is made to rest upon the amount of examination, inquiry and diligence which the assessors exercised in coming to their determination. A vigilant assessor would have jurisdiction, while his easy-going associate, making no inquiries but acting in equal good faith, would have none. This is running counter to all our ideas of judicial responsibility.

A judge or officer acting judicially, either has or has not jurisdiction over the person and subject-matter. If he has, he is not liable personally, even if actuated by malice; if he has not, he is liable personally, even while acting in good faith. If jurisdiction is given him to decide upon a question of value in his assessment of certain stock, his decision upon

that subject is within the jurisdiction given him, though he plainly err in his decision respecting such value.

(*d.*) Hence, to return to our first proposition, at least one of the questions upon which this case was disposed of by the State court, was not of a Federal nature, and therefore the judgment must be affirmed without inquiry as to the correctness of such decision. But if the court determine to look further into the case, then it is contended:

SECOND. The assessment of the shares of stock belonging to plaintiff was valid.

(*a.*) The *taxation* was not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.

People v. Commissioners, 4 Wal., 244.
People v. Dolan, 36 N. Y., 59.

In first above cases, Judge Nelson, speaking for the Supreme Court of the United States, said, in regard to this act: Upon a true construction of this clause of the act, the meaning and intent of the law-makers were that the rate of taxation of the shares should be the same or not greater than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens." (Page 256.)

This statement as to the meaning of the word is referred to again by the Supreme Court of

the United States, and approved of by it as a correct exposition of the meaning of the statute.

See opinion of Justice Hunt, in Adams v. Nashville, 95 U. S., 19, at pp. 20, 21.

The remarks in first case were made in relation to a claim on behalf of the owners of national bank shares that they were taxed at a greater rate than citizens owning other moneyed capital, because allowance was made such citizens on account of the ownership of United States bonds, while they were compelled to pay upon the full amount of the shares owned by them; hence their argument that a refusal to recognize such an allowance in their favor resulted in taxation at a greater rate than the law allowed. The answer to the proposition has been already quoted.

In the case in the N. Y. Court of Appeals (People v. Dolan) the relator claimed to include his bank shares in his personal property generally, and to deduct his debts from the total, which was denied him, and such denial sustained by the Court of Appeals. The same argument was made there as to what was the meaning of the term "rate of taxation." Judge Hunt, in speaking of the *rate*, said: "The rate, or ratio, "*is the percentage merely*, the proportion, the "degree. If the State imposes a tax of five "mills upon the dollar on all the real and per- "sonal property in the State, five mills on the "dollar is the 'rate,' the degree, the proportion, "the percentage of taxation." And see People v. Commissioners of Taxes (35 N. Y., 423) at page 431, where the meaning of the statute is discussed by Chief Judge Davies, and the same conclusion come to. This is the case that was affirmed in 4 Wall., 244.

(*b.*) This assessment was made on the same principle. It is conceded that the rate of taxation, the percentage, is alike in all the case — *i. e.*, after the assessment as to valuation was made, the *rate* upon such valuation was exactly the same in all cases.

The distinction is clearly set forth in the referee's report, and the result is also there shown.

Undoubtedly, in some cases, injustice is done individuals. Cases occur where the value of bank shares in two different banks appears the same on the assessors' books, and, in fact, such value is very different in the two cases. Such is also the fact in relation to two individuals assessed for personal property. A may be assessed for $50,000, and B for $10,000, when, in fact, A only owns $50,000, and B may own $100,000. But the *rate* of taxation upon the two persons may still be precisely the same, and if, upon such a valuation, the same percentage of tax is collected in each case, then the rate of taxation *is*, as a matter of fact, precisely the same in each case.

THIRD. There is no force in the exception to the failure of the referee to find that the State law is unconstitutional, so far as it authorizes the taxation of shares in a separate and distinct assessment, and at any place other than the residence of the share owner, and also because it permits no deduction for the indebtedness of the indivual — even assuming that such a question can be raised by an exception to an omission to find.

(*a.*) By the express terms of the United States statute, the State is vested with the power to direct and determine the manner and place of taxing

all the shares of national banks (U. S. R. S., § 5219).

(*b.*) The statute of 1866, chapter 761, of the Laws of New York, provided for this means of taxing the shares of national banks.

(*c.*) The precise question has been decided in favor of the constitutionality of such a law by the Supreme Court of the United States.

Tappan v. Merchant's National Bank, 19 Wal., 490.

(*d.*) The question of the right of a State to pass a law fixing the place of taxation for national bank stock having been decided by this court in favor of the existence of such right, whether the State statute, passed for the purpose of exercising such right, is in conflict with the State Constitution, or what is the proper construction of such an act with regard to its own laws will be left by this court to be decided by the State court, and this court will follow such decision.

(*e.*) The court is referred for a further answer to this question of separate listing, to the opinion delivered in the court below and to be found (upon that subject) at folio 82 of the printed record.

FOURTH. The claim to deduct personal indebtedness from the total value of the personal property, and for that purpose to include the valuation of the bank shares in the valuation of the balance of the personal property of the owner, is not a valid claim.

(*a.*) As to including the valuation of the shares in the general valuation of the owner's personal

property, at his residence, the statutes and the case cited under last point furnish a complete answer.

(*b.*) The claim for exemption was never made in this case, and hence is simply an abstract question — which this court will not decide. (Finding of Referee, fol. 100.) The statute requires such claim to be made to the assessors, and an affidavit as to its truth, etc.

Ch. 86 of Laws of 1850, § 9; already quoted.
Albany City Laws, ed. of 1856, p. 382.

So whatever might be decided in the other case, it cannot be raised here because the statute, whose provisions the plaintiff invokes, was not complied with by him in this case in order to enable him to claim its advantages. But, as already argued, the plaintiff had no right in any event to such deduction.

(*c.*) These questions thus decided do away with all occasion to further argue the matters contained in the report of the referee as to the assessment upon the shares of the Mechanics and Farmers' Bank, the rate of *assessment* or valuation of personal property invested in other ways, and as to insurance companies, trust companies and the like. The rate of taxation is the same in all, and no statute is violated thereby, nor the Constitution of the United States or of this State.

Therefore, and upon the ground thus far discussed, the judgment of the Supreme Court should be affirmed. But,

FIFTH. The act of the assessors was judicial in its character, and even if erroneous, no liability attaches to them on that account. If this court determine to examine this question, I would say:

(*a.*) In this case the finding is that the defendants acted in good faith in their assessment; that there had been no judicial opinion expressed at the time of the assessment as to how it should be made (fols. 104–117), and there was no malice on defendant's part and that they acted in good faith. The leading case on the subject of the irresponsibility of assessors for a judicial act in the State of New York is Weaver v. Devendorf et al. (3 Den., 117), and this same principle is decided, or assumed to exist, in all the following cases:

Barhyte v. Shepherd, 35 N. Y., 238.
Swift v. City of Poughkeepsie, 37 N. Y., 511.
Railroad Co. v. Supervisors of Erie, 48 N. Y., 93.
Clark v. Norton, 49 N. Y., 243.
National Bank of Chemung v. City of Elmira, 53 N. Y. 49.
Dorwin v. Stickland, 57 N. Y., 493.
Youmans v. Simmons, 7 Hun, 466.

(*b.*) Of course, if there be a lack of *jurisdiction* in the assessors to make the assessment then they are liable. Such are the cases in 53 N. Y., 49, and 57 N. Y., 402, and Overing v. Foote (65 N. Y., 263.)

(*c.*) There is claimed to have been a lack of jurisdiction, here, because, as plaintiff alleges, the defendants have taxed him at a greater rate than is assessed upon other moneyed capital, which, as plaintiff alleges, they had no right to do, and, doing it, their action is without jurisdiction. It

would seem that the fallacy of that argument is plain.

(1.) It is not claimed that the defendants did not have (1) jurisdiction of the person of the plaintiff, or (2) jurisdiction to make *some* assessment of value, to be determined by the judgment of the assessors upon the shares of the plaintiff. The two statutes give them such jurisdiction in terms. (3) The question, then, as to the *amount* of the assessment is one, of all others, judicial in its nature.

(2.) It is entirely different from jurisdiction to assess an individual, provided he is a resident, and no jurisdiction to assess in case he is a non-resident. In such case, the fact of residence must exist, or there is no jurisdiction, and the fact of residence or non-residence is not altered by a decision of the assessors upon the subject. So as to the *time* in which an assessment may be made — if made outside of it, there is no jurisdiction, because a fact upon which jurisdiction depends does not exist when the assessment is made.

(3.) Here, the case is wholly different. The assessors have jurisdiction of the person of the plaintiff, and jurisdiction to make an assessment upon the property. The only question for the assessors to determine is the amount of such assessment.

(*d.*) Having jurisdiction to decide upon such amount, it would seem clear that their decision upon such a question was judicial in its nature, and if

erroneous, liable to be corrected by a proceeding taken for that purpose, but such error not rendering them personally liable therefor. In the case in 53 New York, Church, Ch. J., in giving the opinion of the court, refusing to hold it a judicial act to decide a question of residence or non-residence, or the liability of certain property to be taxed at all, said, in speaking of the case of Weaver v. Devendorf, "the case was properly "decided upon the ground that in fixing the "value of property the power exercised is judi-"cial."

The whole opinion shows that in the mind of the judge an assessment of property, which the assessors had a right to assess at some amount, at a higher rate than was proper, was, and is, a judicial determination. The learned judge says in the course of the same opinion, in speaking of an assessment of bank shares in the absence of a special act, and by virtue of the general power of the assessors to assess property, that in such event the assessors would have jurisdiction over the subject matter, "and if they erred in "assessing it at too high a rate, either because "a part of the capital was invested in govern-"ment bonds, or for any other reason, it was an "error merely," and he quotes from the opinion of Bacon, J., in Swift v. City of Poughkeepsie (37 N. Y., 511, at 512), "that the determination "of the assessors to impose the tax at the rate "specified by them was a judicial determination, "and that although such error might be cor-"rected by an appropriate proceeding, it did not "lay the foundation for any action at law to "redress the alleged injury." It thus appears that where there is jurisdiction over the person, and over the property, that is, *where the prop-*

erty is taxable, the assessment is valid, though it be for too great an amount. Such is this case even upon plaintiff's claim.

(*e.*) All these different findings by the referee as to valuation of personal property for taxable purposes, in the different counties of the State, as to the action of other assessors in regard to trust companies and private bankers, as to action of these defendants in their omission to search records of clerks' offices, to assess certain joint stock or loan associations, etc., etc., are wholly immaterial to any question to be decided in this case. Jurisdiction to assess these bank shares did not depend upon the assiduity with which the assessors hunted up other property for taxation, or whether they assessed all persons for all their property.

The assessors here followed the statutes so far as any jurisdictional facts are concerned, and if any error crept in to the performance of their duty, the plaintiff should have corrected such error in a proceeding for that purpose, and not have attempted to hold these poor men liable personally for a mere error (if any) in judgment, as to the value of the shares of stock in a national bank.

SIXTH. The judgment of the Court of Appeals of the State of New York, should in each of the above actions be affirmed with costs.

R. W. PECKHAM,
Of Counsel for Defts. in error in each action,
Albany, N. Y.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE PEOPLE, EX REL., ETC., PLAINTIFFS IN ERROR, *against* WEAVER ET AL.	No. 97.
WILLIAMS, PLAINTIFF IN ERROR, *against* WEAVER ET AL.	No. 1047.

Statement as to Laws and Judicial Decisions Relating to the Taxation of Individuals and Corporations, for Personal Property, in the State of New York.

The following are extracts from chapter 86 of the Laws of 1850, providing for the assessment and collection of taxes in the city of Albany:

§ 5. Between the third Tuesday of April and the first day of September in every year, the board of assessors of the city of Albany shall ascertain, by diligent inquiry, the names of all taxable inhabitants in the several wards of the said city, and also all the taxable property, real or personal within the same.

§ 6. They shall prepare an assessment roll for each of the

wards in the said city, in which they shall set down in separate columns, and according to the best information in their power:

1. In the first column the names of all the said taxable inhabitants of the ward, and also the names of all other persons having real estate belonging to them in the ward.

2. In the second column, and opposite the name of each such inhabitant or person, a brief and proper description, with the dimensions and boundaries of the real estate in the ward belonging to such inhabitant or person. * * *

3. In the third column, and opposite the description of each parcel of real estate, the full value of such real estate.

4. In the fourth column, and opposite the name of each inhabitant of the ward, the full value of all the taxable personal property owned by such inhabitant, after deducting the just debts owing by him, and his property invested in any stock of any corporation or association liable to be taxed for such stock as capital or otherwise.

§ 9. If any person shall at any time before the assessors shall have completed their assessments make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more.

The provisions of this section shall apply to any trustee, guardian, executor or administrator in their representative character.

§ 11. The corporations or associations liable to taxation, whose principal office or place of transacting the financial business of such company is situated in the city of Albany, shall make the same returns to the board of assessors aforesaid, or one of them, within the same time, and subject to the same penalties for neglect as prescribed in the general

laws of the State in respect to returns by such corporations to assessors of towns and wards; and in case of neglect to make such return the said assessors shall, nevertheless, proceed to assess the said corporations, according to the best information in their power, in the same manner as if such returns had been fully made; but neither such assessment, nor the payment of any tax pursuant thereto, shall exonerate such defaulting corporation or association from the penalty incurred by neglecting to make any such return.

The following are general provisions of law on the subject taken from the Revised Statutes, part 1, chapter 13:

TITLE I, § 1. All lands and personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified.

§ 3. The terms "personal estate" and "personal property," whenever they occur in this chapter, shall be construed to include all household furniture, moneys, goods, chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, public stocks and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

§ 4. The following property shall be exempt from taxation:

1. All property, real or personal, exempted from taxation by the Constitution of this State, or under the Constitution of the United States.

* * * * * *

7. The personal estate of every incorporated company not made liable to taxation on its capital, in the fourth title of this chapter. * * * *

§ 7. The owner or holder of stock in any incorporated company, liable to taxation on its capital, shall not be taxed as an individual on such stock. 1 R. S., pages 387, 388.

TITLE II, § 5. Every person shall be assessed in the town or ward where he resides, when the assessment is made, for all personal estate owned by him. * * *

§ 6. The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be, or if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on. * * *

§ 8. Between the first days of May and July, in each year, they (the assessors) shall proceed to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their respective towns or wards, and also all the taxable property, real or personal within the same.

§ 9. They shall prepare an assessment roll, in which they shall set down in four separate columns, and according to the best information in their power :

1. In the first column, the names of all the taxable inhabitants, in the town or ward as the case may be.

2. In the second column the quantity of land to be taxed to each person.

3. In the third column, the full value of such land, according to the definition of the term land, as given in the first title of this chapter.

4. In the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him. (1 R. S., pp. 389 to 391).

Title 4 of same chapter of Revised Statutes provides that all moneyed or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital, in the manner thereinafter prescribed. (1 R. S., 414.)

The provisions of title 4, prescribing the manner of taxation, were amended by chapter 456, of the Laws of 1857, as follows:

§ 3. The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus, profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county.

In construing this law as to the assessment of corporations, the Court of Appeals held in the case of The People ex rel. Glens Falls Insurance Company v. Ferguson and others, Assessors (38 N. Y., 89), that in order to get at the actual value of the capital, not only debts but contingent liabilities should be deducted. It is said in the opinion of Chief Judge Hunt, in that case:

"If a corporation or an individual has an actual estate in possession of $100,000, and is liable as guarantor, or indemnitor, or indorser, or bail for $50,000, and the principal in all these liabilities is insolvent, so that he will certainly have to pay the $50,000, is not the actual value of his estate reduced by that amount? True, he cannot be said to owe that amount until the lapse of time, or a notice of non-payment, or some other occurrence, will entitle some other party to commence an action against him. His actual estate, however, is reduced in value by just that amount. No assessor or individual could justly say that 'the actual value' of his estate, subject to these contingencies, was as great as it would be if free and clear from them. No man would give him as much for his estate, subject to these claims, as if there were no such claims." (38 N. Y., 92.)

See, also, upon this point, the case of The People ex rel. The Western Railroad Corporation v. The Assessors of Albany. (40 N. Y., 154.)

The rule was thus laid down in a recent case in the New York Supreme Court, in speaking of the mode of getting at the actual value of the capital stock of a corporation for the purpose of taxation: "In ascertaining such value the commissioners cannot disregard the fact of indebtedness. It enters as much into the value of the stock as it does in the assessment of the personal estate of an individual. If an individual owns $1,000 worth of personal estate and is indebted $1,000 there is no value in personal estate remaining on which he can be assessed. This is provided for by statute, which directs the valuation of the personal estate in gross and then directs the deduction of indebtedness. In regard to corporations the mode is different, but the result should be, in effect, the same. The capital stock should be valued at what it is actually worth. In ascertaining such value the amount of indebtedness of the company must enter into the estimate. If the nominal capital of the company is $100,000 and is worth par, and the company is indebted $100,000, there would be no value in the stock to be assessed." (People ex rel. Broadway and Seventh Ave. R. R. Co. v. Commissioners of Taxes (1 N. Y. Sup. Ct. Rep. [T. & C.], 635–637.)

In making assessments of the personal estate or capital of all corporations other than banks, deductions for the indebtedness of the corporation are, in fact, allowed by the assessors of the city of Albany.

The foregoing statement is correct.

April 2, 1879.

MATTHEW HALE,
Attorney for Plff. in Error.

R. W. PECKHAM,
Attorney for Deft. in Error.

Supreme Court of the United States.

PEOPLE v. WEAVER.

No. 97.

WILLIAMS v. WEAVER.

No. 1047.

MEMORANDUM NOTES OF MR. EDMUNDS' REPLY TO THE ARGUMENT OF MR. PECKHAM IN THESE CASES.

I.

Mr. Peckham's point, that the mandamus was too late in the Supreme Court of the State of New York, on account of the supposed want of power of the respondents, at the time of the hearing, to correct the assessment if ordered,—reply:

1. The New York court did not so hold, but decided the cause on the *sole* ground that the tax was legal and had been legally imposed. (Record, p. 8.)

2. The case submitted by the agreed state of facts raised no such question. Three questions on the merits were submitted to the court, by argument of parties. (Record, p. 5.) This court cannot go into a trial of State law by a search to see if some other ground *might* have existed to justify the judgment below, when the record shows that the judgment was upon the precise points of national right which indicated the real controversy between the parties.

II.

Mr. Peckham's point, that the relator did not file a proper affidavit,—reply:

1. This question was not raised in the court below, or decided. (Record, p. 8.)

2. Section 4 of the act of New York of 1850 shows that the facts stated in the affidavit conform with the jurisdiction conferred by the statute upon the assessors. They had no jurisdiction to assess other than *taxable* property. United States bonds are not taxable property, and hence, in a legal sense, the affidavit was the same as if the phrase about the bonds had been omitted.

3. If the State law did discriminate against U. S. bonds, it was illegal, and left the discrimination against national bank stock just as great and illegal as before. The facts required the deduction unless the discrimination is valid.

4. The relator was not bound to make any affidavit at all, so far as it regards the taxation of his bank shares in question. The act of 1866 had taken those shares entirely out of the category of the taxation laws of the State under which the *net* amount of personal property only was to be taxed, if the act of 1866 was valid law, in respect even of a separate assessment.

III.

Case of People *vs.* The Commissioners (4 Wall.) has no application, and did not involve these questions. It only held that the individual owners of bank shares could not have their valuation diminished by the amount of U. S. bonds held by the bank, because they and the bank were

entirely different persons; it merely applied the principle of Van Allen's case.

IV.

To Mr. Peckham's point, that the State law is a law of special exemptions merely, like that in Hepburn's and Adams' cases, and that there must be *some* person who owes no debt, and the net value of whose personal property, therefore, is the same as its gross, and hence that the plaintiff is no worse off than *some* possible holder of other moneyed capital,—reply:

1. Hepburn's case was that of an exception, *local* and *specific*, and entirely different from a general and systematic rule of taxing the *net* personal estate and money capital of citizens, except that consisting of bank shares, and taxing them in *gross*. The United States statute only authorizes the national bank shares to be "*included in the valuation* of personal property of the owner or holder of such shares in *assessing* a tax imposed by authority of the State." This is an industrious jurisdictional and material statement. The shares must be *included* in the valuation of other property in *assessment*, and not excluded and subjected to a different rule and procedure less favorable to the owner. True, the Legislature may determine the manner and place of taxation, but it must not be a determination that violates the previous specific provision for inclusion. To these provisions the U. S. law adds two "*restrictions*" in the same phrase, that "the taxation shall *not* be at a *greater rate* than is *assessed* upon other moneyed capital in the hands of *individual citizens* of such State; second, that the shares of non-residents shall be taxed in the city or town where the bank is located, and not elsewhere." Both these provisions are restrictions or neither is, and both, or neither, must be held mandatory and jurisdictional. No one questions that the

second, as to place, is of a jurisdictional character, and cannot be violated with impunity by any amount of "good faith." The first is just as much a restraint in the same sense, and cannot be elastic while the other is rigid.

The whole provision, therefore, is a rule respecting *authority*, and not a rule guiding the *judgment* of assessors. The State statute itself, as well as the action of the assessors, contravenes this rule, and as this court, in Van Allen's case, held that a State statute was bad because some part of the bank capital might be invested in bonds, so here every shareholder may owe debts, and generally does. The restriction is, that the taxation shall not be at a "greater rate than is assessed upon other moneyed capital," &c. What is an assessment? It is "a *valuation* of the property of those who are to pay the tax, for the purpose of fixing the proportion which each man should pay; on which valuation the law imposes a specific sum upon a given amount." (Worcester's Dict.; Blackstone's Comm.) Or, the law may require a certain sum to be raised, and then the assessing officers compute the proportion necessary to produce the sum required, which is the same thing. What is *rate?* It is not merely the percentage or proportion to be computed, as defined by Judge Hunt, although that is one of its definitions. Worcester defines it to be the "something supposed or laid down as of a certain *value*, in relation to which other things are estimated; a standard." Its law definition is, "a public valuation or assessment of estates; a tax assessed according to the value of property," &c. Thus, the letter of the statute does not support the idea of mere arithmetical computation by the same multiplier, much less does the plain spirit and intent of the statute do that. The fact that the plaintiff's shares were worth more than par does not affect the question. The whole matter of valuation for taxation is *relative*, and it is the rate in the valuation, and not the multiplication made upon it, that produces either right or robbery. The relator

did not ask to have his assessment of this stock reduced below its real value, but worth whatever it was / his other / taxable personal property, *with* the *full* value of the shares, did not exceed one dollar after deducting his just debts. No case was ever known of differential computations of percentage of the tax, after assessment upon the same classes of property.

ILLUSTRATIONS.

Suppose State law says all taxes shall be assessed on bank shares, but at the same "rate," leaving untaxed all other moneyed capital?

Suppose a State bank charter contains provisions like the act of Congress, and afterwards the State arranges the taxable valuation and assessment of all other moneyed capital so as to relieve the burden upon it in whole or in part?

Suppose a railroad charter requires that all citizens' freight shall be carried at the same "rate" per ton, and then the railroad makes a regulation for deductions from the total tons carried for favorite customers, by a certain test of proportion, or valuation, or indebtedness?

Suppose, under the Constitution of the United States, imposts are laid upon imported goods at a certain "rate" *ad valorem*, and provision is made that all importers, except those of a certain State or class, shall have their valuations reduced by the amount of what they owe on the goods, or by any other test?

Suppose a State says that all other moneyed capital than bank shares shall be set in the assessment roll at 50 per cent. of its value, and the same percentage upon both levied?

Suppose A borrows $100,000 and invests it in stock of a railroad corporation, or on a mortgage, and B borrows $100,000 and invests it in bank shares? Under the exist-

ing law of New York, A is not taxed at all, and B is taxed on the full sum.

V.

The New York act of 1866, then, was unconstitutional, as in conflict with the act of Congress, and relator, if he was to be taxed at all, he had a right to be taxed on the same principle and upon the same net of his personal estate that other citizens are taxed under the law of 1850, and it was the duty of the assessors to make the reduction to net accordingly.

VI.

As to No. 1047, all said before applies.

1. The fact plaintiff did not apply for deduction to *net*, makes no difference. Assessors were bound to proceed according to law, whether he applied or not.

2. They did not include his stock in the valuation of his other personal estate, but put it in a separate list, in which separate list the law did not give him the right to apply for deduction. The law of 1850 only applied to the mass of his personal estate, and the law of 1866, under which 1047 proceeds, made no provision for reduction.

The whole tax by a separate list valuation and assessment was illegal, because—

1. It was not assessed under the act of 1850 with the other personal property of the plaintiff, but separately and by itself, under the act of 1866, which, as before shown, is discriminatory, and in conflict with the act of Congress.

2. The assessors did not follow the act of 1866 and assess by a valuation in their judgment true, either in fact or

in relation to the stock of the State banks, but put it in the roll at a *willful* and *arbitrary* sum, the "par" of the stock; which arbitrary act, as the record shows, not only discriminated against it in its relation to other moneyed capital in the hands of individuals, but discriminated against it in relation to the shares in State banks of the same city. (Record, p. 16; findings 8, 9, 10.)

They "*did not inquire or endeavor to ascertain the actual or market value*" of the shares of the banks. (Finding 9; see also findings 11 and 12.) They did not assess the individual bankers doing business in the same ward, and having large capital, at all. *Nor did they* "*attempt* to so assess any individual banker." (Findings 14 and 15.)

Every other corporation except banks was by law liable to assessment only for its personal estate and moneyed capital, after deducting its indebtedness; i. e., as in the case of individual citizens. (Record, p. 19; finding 29.)

4. The defendants made no examinations of public records for the purpose of ascertaining property subject to taxation, "nor did they make inquiries as to the rate at which moneyed capital in the hands of individual citizens was assessed outside of the city of Albany."

5. The assessment was "based upon the *par value* of the shares, without reference to the surplus of the banks," and the defendants thereby actually imposed a discriminating tax upon the plaintiff. (Finding 31.)

Were all these arbitrary violations of law within the jurisdictional discretion of the defendants?

Their jurisdiction, under the act of Congress, was limited and conditional. They neither kept within the limits, nor complied with the condition—not from an error of judgment on a matter of fact which they were bound to decide, but from an error of will in *choosing* to disobey the law. (53 N. Y. Rep., p. 58.) They did not even follow the law

of the State, which required them to ascertain the value, but, by an arbitrary act of will, chose to injure the plaintiff by omitting to judge of the value, and thereby imposed upon him an unjust discrimination, against the act of Congress.

The test of a jurisdiction even of a body whose jurisdiction is not specially limited and controlled by law, as in this case, is that the body must do and omit what the law requires. In respect to value, as such, the law requires them to consider and judge by an intellectual process, and that is so far an exercise of jurisdiction, and if they have judged wrong, they have still obeyed the law by judging. Here they did not judge at all, but exerted their will against their knowledge or means of knowledge, and without intellectual judgment. (Hilliard on Taxation, p. 338, 357.

A "*bona-fide*" violation of law, by refusing to consider and estimate value, when the mandate of the law requires it, is not that species of good faith that protects them. In McVeigh's case (Wall.) the judgment of a court of general jurisdiction, in a case *in rem*, was held void because the court refused to allow the defendant to be heard, believing he had no status in court.

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Every tribunal of limited jurisdiction is responsible for disobedience of the law. Its errors of judgment are, in matters submitted to its judgment, not disobedience of the law, for it requires it to judge, and judging, whether erroneously or otherwise, it has fulfilled the law. These defendants did not judge or profess to.

VI.

Jurisdiction of this Court.

1. Whatever violation of rights is not justifiable under the act of Congress, which alone gives the defendants the right to act at all in respect of these shares, must be the subject of review and redress here. The plaintiffs' "im-

munity" from these impositions, is claimed under the act of Congress and the Constitution. If these do not protect him in the premises, he has no case. If they do, he is within section 709 of the Revised Statutes of the United States, for the State court decided against the "right" and "immunity" claimed, and supported the State officers in the exercise of an "authority" claimed under the law of the State against the right claimed by the plaintiff under the act of Congress.

2. Whether the acts and omissions of the assessors were in accordance with the State law or against it, was of no consequence. The question is, Did they do them against the law of the United States?

In every case of an invalid State law, the national courts intervene *against the wrong act of the party*, and not against the law itself, and hold that he cannot defend under the State law, because in such case there is no State *law*,—it is void. Every statute of the United States that secures the national rights of citizens, like these as to banks, does and necessarily must operate *directly upon acts of persons*, irrespective of whether those wrong acts have been authorized by a State statute or were mere exertions of power by State officers; and, so, the redress is against the act, and not against or in respect of the moving cause of the wrong.

In both these cases the plaintiff has suffered an invasion by State officers of rights secured by national law. Every step in the progress of the wrong is, therefore, necessarily drawn into consideration here. There can be no exclusive "State question" in respect of any matter that impairs national rights.